

No. PD-1248-19

In the
Court of Criminal Appeals of Texas
at Austin

FILED
COURT OF CRIMINAL APPEALS
7/15/2020
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—◆—
On Petition for Discretionary Review from
Appeal No. 01-18-00539-CR
In the First Court of Appeals
—◆—

No. 1591795
In the 230th District Court of
Harris County, Texas
—◆—

CHRISTOPHER SIMMS

Appellant

V.

THE STATE OF TEXAS

Appellee

STATE'S REPLY TO APPELLANT'S BRIEF ON THE MERITS
—◆—

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ORAL ARGUMENT NOT REQUESTED

IDENTIFICATION OF THE PARTIES

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TO THE HONORABLE COURT OF APPEALS:
STATEMENT REGARDING ORAL ARGUMENT

When this Court granted discretionary review, it announced that oral argument would not be permitted.

STATEMENT OF THE CASE

Appellant was charged with the offense of aggravated assault (CR 239). He entered a plea of not guilty and the case proceeded to jury trial (3RR 8). The jury found appellant guilty of aggravated assault, found his two enhancements true, and sentenced him to 45 years in prison (4RR 58; 5RR 45; CR 251). The court certified appellant's right to appeal, and he filed a timely notice of appeal (CR 254-56).

STATEMENT OF PROCEDURAL HISTORY

On November 14, 2019, the First Court of Appeals issued a memorandum opinion in which it affirmed appellant's conviction for aggravated assault. *Simms v. State*, No. 01-18-00539-CR, 2019 WL 5996378 (Tex. App.—Houston [1st Dist.] 2019, pet. granted) (mem. op.). On December 11, 2019, appellant filed a petition for discretionary review. This Court granted review on April 1, 2020. Appellant's brief on the merits was accepted on May 28, 2020. This Court granted the State's motion for an extension of time to file its brief. The State's brief is now due on July 14, 2020.

STATEMENT OF FACTS

On February 18, 2016, the complainant—Eduardo Gonzalez—drove his car into the Washburn tunnel (3RR 21-26). The tunnel has two opposite lanes and vehicles are required to stay in their lanes while in the tunnel (3RR 20). Appellant had been driving his vehicle approximately one mile inside the tunnel in the opposite direction prior to the complainant entering the tunnel (3RR 21-22; State’s Ex. 18). Shortly after the complainant’s vehicle entered the tunnel, appellant’s vehicle—which was traveling almost double the 35 mile per hour speed limit—left its lane, entered the complainant’s lane, and struck the complainant’s vehicle, causing a head-on collision (3RR 19, 96; State’s Ex. 18). Appellant did not attempt to apply his breaks prior to the collision, but instead pushed his accelerator to the floor and turned his steering wheel just prior to impact (3RR 83, 97-98). The complainant was traveling within the speed limit and was in his proper lane at the time of the collision (3RR 21).

Appellant was found unconscious in the driver’s seat of his vehicle after the collision (3RR 23-26). Appellant remembers entering the tunnel but has no memory of anything that occurred inside the tunnel (4RR 22-23). Appellant’s first memory after entering the tunnel was waking up in the emergency room in severe pain due to a concussion and an injured arm (4RR 23). At trial, appellant testified that he must have “passed out” given the driving facts shown on the video because he was not suicidal (4RR 32-37). Appellant made it clear during trial that he had no way of knowing that

he would pass out prior to the collision because he was not tired, had not been drinking or taking drugs, and had no medical condition which would have caused him to lose consciousness (4RR 23, 37). Appellant agreed that the collision caused the complainant's death and acknowledged that the evidence—including video of the accident—proves that his vehicle left its proper lane (4RR 30). However, he denied recklessly causing the collision because he testified that he must have lost consciousness upon entering the tunnel (4RR 32-35).

The State presented evidence that the complainant experienced pain in his abdomen and underwent emergency surgery to repair damage to his intestines caused by the collision (3RR 36, 117-119). After several days, the complainant died as a result of the blunt force trauma sustained in the collision (3RR 42; 4RR 13-14).

SUMMARY OF THE ARGUMENT

Appellant is not entitled to a deadly conduct lesser-included offense instruction because there is no evidence in the record that would permit a rational juror to find that he is guilty of deadly conduct but not of aggravated assault. If the jury credited appellant's testimony that he lost consciousness upon entering the Washburn tunnel, then it would have been required to find him not guilty of both aggravated assault and deadly conduct. This is so because appellant's testimony, if believed, negates the *mens rea* for both deadly conduct and aggravated assault. Evidence showing that appellant's vehicle was traveling faster than the speed limit almost one mile after he claimed to have

lost consciousness does not change this fact, because if the jury believed appellant's testimony that he was unconscious during this time, it could not conclude that he consciously disregard the risk posed by his speeding. Additionally, there is no evidence showing that he was acting recklessly prior to the time he claimed to have lost consciousness and no evidence showing that his speeding did not cause the complainant to suffer serious bodily injury. Therefore, there is no evidence in the record which would allow the jury to find him guilty only of deadly conduct.

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ARGUMENT AND AUTHORITIES

A defendant is only entitled to a lesser-included offense instruction if he can show that the elements of deadly conduct are included within the proof necessary to establish the offense charged and that some evidence exists in the record that would permit a rational juror to find that if guilty, he is guilty only of deadly conduct. *Hall v. State*, 225 S.W.3d 524 (Tex. Crim. App. 2007).

A person commits aggravated assault by committing assault as defined by TEX PENAL CODE §22.01 and by causing "serious bodily injury" to another. TEX PENAL CODE §22.02(a)(1). A person commits assault by "intentionally, knowingly, or recklessly" causing "bodily injury to another." *Id.* §22.01. A person commits deadly conduct if he "recklessly engages in conduct that places another in imminent danger of serious bodily injury." *Id.* §22.05. An offense is a lesser included offense if:

1. It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
2. It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
3. It differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
4. It consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. Art. 37.09.

In appellant's case, the indictment authorized the jury to convict him of aggravated assault if it found that he recklessly caused serious bodily injury to the complainant by "failing to control speed, failing to maintain a single lane of traffic and failing to keep a proper lookout" (CR 8). To find him guilty of deadly conduct, the jury would have had to find that appellant recklessly engaged in conduct that placed the complainant in imminent danger of serious bodily injury. TEX. PENAL CODE §22.05(b). Because the State was necessarily required to prove that appellant placed the complainant in imminent danger of serious bodily injury to prove that he caused serious bodily injury to the complainant (as required by aggravated assault), deadly conduct is established by proof of the same or less than all the facts required to prove aggravated assault. *See Guzman v. State*, 188 S.W.3d 185, 191-92 (Tex. Crim. App. 2006).

This is so even though the application of the *mens rea* of the two offenses is slightly different. To prove aggravated assault, the State must prove that the defendant recklessly caused the result (serious bodily injury) but to prove deadly conduct the State is merely required to prove that the defendant recklessly engaged in conduct that placed

the complainant in danger of serious bodily injury. Despite this difference, deadly conduct is a lesser-included offense of aggravated assault because one who causes serious bodily injury necessarily places a complainant in imminent danger of serious bodily injury. *Ford v. State*, 38 S.W.3d 836, 845 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Therefore, deadly conduct is a lesser-included offense of aggravated assault in this case.

However, the fact that deadly conduct is a lesser-included offense of aggravated assault is not sufficient to entitle appellant to a lesser-included offense instruction. As noted above, to be entitled to this instruction, there must be some evidence that would permit a jury to rationally find that appellant is only guilty of the lesser offense. *See Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011). One way that a defendant can satisfy this requirement is if the lesser-included offense requires a lower *mens rea* and he can point to some evidence in the record supporting the conclusion that he acted with a lower *mens rea*. In his brief, appellant cites two cases¹ in which the defendants were charged with intentionally and knowingly committing aggravated assault and the appeals court held that they were entitled to a deadly conduct instruction because there was some evidence supporting a finding that the defendants recklessly caused the

¹ *Isaac v. State*, 167 S.W.3d 469 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) and *Bell v. State*, 693 S.W.2d 434 (Tex. Crim. App. 1985).

complainants' serious bodily injuries. These cases are inapplicable to appellant's situation because appellant was charged with recklessly committing aggravated assault. Therefore, evidence that appellant acted recklessly is not some evidence showing that he is only guilty of deadly conduct. Likewise, appellant is unable to argue that he recklessly engaged in conduct that placed the complainant in serious bodily injury but did not cause the complainant's serious bodily injury because it was undisputed at trial that appellant caused the complainant's serious bodily injury (4RR 29-30).

However, it is possible for a defendant to be entitled to a deadly conduct instruction in a situation in which he is charged with recklessly committing aggravated assault even if he caused the complainant serious bodily injury. This is because to convict a defendant of deadly conduct, the State must only prove that the defendant's reckless action placed the complainant in danger of serious bodily injury but to convict a defendant of aggravated assault, the State must prove that the defendant recklessly caused the complainant serious bodily injury. This situation arises because aggravated assault is a result of a conduct offense, but deadly conduct is not. *See Ford*, 38 S.W.3d at 845. Therefore, if there is some evidence that a defendant recklessly engaged in conduct that placed the victim in danger of serious bodily injury, a defendant can be entitled to a deadly conduct instruction even if it is undisputed that the defendant caused the complainant serious bodily injury so long as there is some evidence that would allow a rational juror to conclude that the defendant's reckless action that placed the complainant in danger of serious bodily injury did not cause the complainant's

injuries. A defendant can satisfy this burden if there is some evidence showing that the victim's serious bodily injury was not caused by his reckless action but instead was caused at a different time by the defendant's negligence or mistake.

This scenario occurred in *Ford v. State*. 38 S.W.3d at 845-46. In *Ford*, a witness observed the defendant recklessly swing a knife toward the complainant. This evidence was sufficient to allow a rational juror to believe that appellant had committed the offense of deadly conduct. However, while it was undisputed that the defendant's knife at some point caused the complainant's serious bodily injury, the witnesses who observed the reckless knife swing testified that they did not observe the reckless swing injure the victim. Because of this testimony, the court concluded that there was some evidence that would have allowed the jury to find that the victim was injured by negligence or accident at some other point in the scuffle and not by the defendant's reckless knife swing. For this reason, the appellate court ruled that the jury could have rationally concluded that the defendant was guilty of deadly conduct for recklessly swinging his knife at the complainant, but not guilty of recklessly causing the complainant's serious bodily injury. As a result, the court held that the defendant was entitled to a lesser-included deadly conduct charge.

Appellant argues that this scenario controls his case. He claims that data from his vehicle showing that he was traveling "58 miles per hour in the Washburn Tunnel when the posted speed is 35 miles per hour" is evidence that would allow a rational juror to find that he recklessly endangered the complainant and thus is guilty of deadly

conduct (AB 11). He next asserts that his vehicle's lane change, rather than its speed, caused the complainant's injuries (AB 11). Therefore, he argues that his testimony that he lost consciousness upon entering the tunnel constitutes an "intervening factor" that would have allowed a rational juror to find that his reckless action of speeding endangered the complainant but did not cause the complainant's serious bodily injury (AB 11).

Appellant's argument fails for several reasons. As noted above, his position depends on the incorrect assumption that speeding is reckless per se. Appellant implies that traveling 58 miles per hour in a 35 mile per hour zone is per se reckless (AB 11). However, to act recklessly, a person must be aware of, but consciously disregard, the risk of his action. TEX PENAL CODE §6.03(c). Therefore, if the jury had credited appellant's testimony that he was unconscious during the time his vehicle was speeding, the jury would have been required to find appellant not guilty of both deadly conduct and aggravated assault. This is the reason that appellant's testimony that he lost consciousness upon entering the tunnel negates the required *mens rea* of both aggravated assault and deadly conduct. If believed, the jury would be unable to find appellant guilty of any reckless conduct because there is no evidence that he acted recklessly prior to the point that he lost consciousness. Therefore, rather than support a lesser-included offense of deadly conduct, appellant's testimony—if believed—would require the jury to find him not guilty of both deadly conduct and aggravated assault.

Appellant's case is unlike *Ford* because the witness's testimony in that case established the *mens rea* for deadly conduct but not for aggravated assault. In appellant's case his testimony, if credited by the jury, negates the *mens rea* for both offenses. Evidence showing that appellant was speeding inside the tunnel does not change this fact, because a rational juror could not both credit appellant's testimony that he was unconscious the entire time he was inside the tunnel, and also infer from his vehicle's speed that he was acting recklessly. For this reason, if the jury chose to credit appellant's testimony, it would either have had to discredit the evidence showing appellant's speed inside the tunnel or credit appellant's testimony that his speed was the result of his heavy foot (4RR 36). This is because an appellant is not entitled to a lesser-included offense instruction unless there is some affirmative evidence in the record that would permit a rational jury to conclude that he committed only the lesser-included offense. *See Goad v. State*, 354 S.W.3d 443, 447-48 (Tex. Crim. App. 2011). It would not be rational for a jury to credit appellant's testimony that he was unconscious in the tunnel while simultaneously interpreting evidence of his vehicle's speed to mean he was conscious inside the tunnel. Therefore, appellant's testimony coupled with evidence that his vehicle was speeding inside the tunnel is not some evidence that would permit a rational juror to conclude that appellant is guilty of deadly conduct but not aggravated assault.

Appellant's claim also fails because it was undisputed at trial that appellant's speeding caused the complainant's serious bodily injury. Appellant asserts on appeal that his speed did not cause the collision (AB 11). However, the question is not whether

appellant's speed caused the collision but whether it caused the complainant's serious bodily injury. In appellant's case there is no evidence that disputes the video evidence and expert testimony showing that the appellant's speed (58 miles per hour a half second prior to the head-on collision) caused the complainant's serious bodily injury (State's Ex. 18; 4RR 10-13). Therefore, unlike *Ford*, in which there was some evidence supporting the conclusion that the defendant's reckless knife swing did not cause the complainant's serious bodily injury, there is no evidence in appellant's case that his reckless speeding did not cause the complainant's serious bodily injury.

It is important to note that appellant's claim would fail even if he had testified that he was consciously speeding inside the tunnel seconds before the collision. This is because if appellant's speeding was sufficiently dangerous to constitute deadly conduct, then he would be guilty of both deadly conduct and aggravated assault given that his speed caused the complainant's serious bodily injury. This is precisely the reason why deadly conduct is a lesser-included offense of aggravated assault. *See Ford*, 38 S.W.3d at 845 (deadly conduct is a lesser-included offense of aggravated assault because one who causes serious bodily injury necessarily places a complainant in imminent danger of serious bodily injury). Therefore, even if appellant had testified that he was conscious seconds prior to the collision but then lost consciousness and changed lanes, he would still not be entitled to a deadly conduct instruction because, if his speeding alone (without a lane change) did not place the complainant in imminent danger of serious bodily injury, then appellant would be not guilty of either offense. If appellant's reckless

speeding (prior to his loss of consciousness) was sufficient to place the complainant in imminent danger of serious bodily injury, then a rational juror would have to conclude that appellant was guilty of both deadly conduct and aggravated assault because the undisputed evidence shows that the complainant suffered serious bodily injury as a result of appellant's speed. *See Id.* Therefore, even if appellant had claimed to have lost consciousness just before his vehicle changed lanes, there would still not be some evidence that would support finding him guilty only of deadly conduct. *See Guzman*, 188 S.W.3d at 193 ("appellant cannot argue that there is some evidence that he 'recklessly engaged in conduct that places another in imminent danger of serious bodily injury,' but no evidence that he 'recklessly caused serious bodily injury, simply by arguing that he did not act with actual recklessness.'").

In conclusion, the first court of appeals correctly determined that appellant was not entitled to a lesser-included deadly conduct instruction because there is no evidence in the record that appellant is guilty of only deadly conduct. Appellant's testimony that he was unconscious while his vehicle travelled through the tunnel, if believed, would show that he was not guilty of both reckless conduct and aggravated assault. Evidence showing the speed of his vehicle during the time he claimed to be unconscious does not change this conclusion because a rational juror could not credit appellant's testimony that he was unconscious and also infer from his vehicle's data that he was recklessly speeding. Consequently, this evidence does not support a lesser-included deadly conduct instruction.

Finally, even if appellant had testified differently and his testimony supported the conclusion that he was guilty of deadly conduct due to his speeding prior to his alleged loss of consciousness, a rational juror would be forced to conclude that he was also guilty of aggravated assault because the uncontested evidence at trial shows that appellant's reckless act of speeding caused the complainant's serious bodily injury. Thus, the evidence showing that appellant is guilty of deadly conduct necessarily proves that he is also guilty of aggravated assault. For this additional reason, appellant was not entitled to a lesser-included deadly conduct instruction. Consequently, the court of appeal's holding—that the trial court did not abuse its discretion by denying appellant's requested jury instruction—was correct.

◆

CONCLUSION

It is respectfully requested that this Court affirm the judgment of the court of appeals.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies in compliance with Texas Rule of Appellate Procedure 9.4(i)(3) that the foregoing petition for discretion review contains 3,998 words, as represented by the word-processing program used to create the document. This document complies with the typeface requirements in Rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in a 12-point typeface.

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No. **PD-1248-19**

In the
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At Austin

CHRISTOPHER SIMMS

Appellant

V.

THE STATE OF TEXAS

Appellee

On Petition for Discretionary Review from
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In the First Court of Appeals

Trial Court Cause No. 1591795
230TH District Court, Harris County, TX
Hon. Mike Wilkinson, Presiding

APPENDIX

Opinion (November 14, 2019) Appendix A

2019 WL 5996378

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do not publish. TEX. R. APP. P. 47.2(b).
Court of Appeals of Texas, Houston (1st Dist.).

Christopher SIMMS, Appellant

v.

The STATE of Texas, Appellee

NO.

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Opinion issued November 14, 2019

Discretionary Review Granted April 1, 2020

**On Appeal from the 230th District Court, Harris County,
Texas, Trial Court Case No. 1591795**

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Panel consists of Justices [Kelly](#), [Hightower](#), and [Countiss](#).

MEMORANDUM OPINION

[Peter Kelly](#), Justice

*1 A jury convicted appellant Christopher Simms of aggravated assault causing serious bodily injury, and, after finding two enhancement allegations true, it assessed punishment of 45 years in prison. On appeal, Simms argues that the trial court erred by not instructing the jury on the lesser-included offense of deadly conduct.

We affirm.

Background

Simms was speeding when he drove his Chevy Impala into the two-lane Washburn tunnel in Harris County. Eduardo Gonzalez Pineda was driving a van in the opposite direction. Simms's car collided with Pineda's van in a head-on collision. A witness, Oscar Barrera, who was driving behind Pineda testified that he and Pineda were driving approximately at the speed limit of 35 miles per hour. A videorecording from the tunnel was played at trial and it showed Simms's car was completely in Pineda's lane just before and at the moment of collision.

Both Simms and Pineda were injured and received emergency and in-patient medical care. Pineda spent about five days in the hospital recovering from internal injuries and emergency surgery. Two days after he was discharged, Pineda began vomiting blood, and he returned to the emergency room, where he later died from injuries caused by the head-on collision.

An investigation of the collision, which included gathering data from the Impala's crash data retrieval system, showed that Simms was travelling at 62 miles per hour two seconds before impact and 58 miles per hour one-half second before impact. In addition, the accelerator position went from 8% to 100% from two seconds before impact to one-half second before impact. According to accident investigator Harris County Deputy B. Wilbanks, this indicated that Simms had "floored" the accelerator just before impact, although the car had no time to respond and accelerate. In addition, crash data collected from the Impala showed that Simms never applied his brakes.

Simms testified at trial that he recalled entering the Washburn tunnel, but he did not recall anything after that until he awoke in pain in the hospital. A nurse told him that he had been injured in an automobile accident. Simms admitted that he was driving the car that caused the accident and speeding at the time. He also admitted that he failed to stay in his lane and to keep a proper lookout. But he denied having been tired or under the influence of alcohol, medication, or illegal substances at the time of the accident. Because he had no recollection of the collision, Simms relied on the videorecording to conclude that he "apparently" "dozed off" or passed out.

At the close of evidence, Simms requested a jury charge on the lesser-included offense of deadly conduct, and the trial court denied the request. The jury convicted Simms, and he appealed.

Analysis

On appeal, Simms argues that the trial court erred by denying his request for a lesser-included offense instruction.

“We review the trial court’s decision regarding including a lesser-included offense in the jury charge for abuse of discretion.” *Brock v. State*, 295 S.W.3d 45, 49 (Tex. App.—Houston [1st Dist.] 2009, pet. ref’d); see *Jackson v. State*, 160 S.W.3d 568, 575 (Tex. Crim. App. 2005). An offense is a lesser-included offense if:

- *2 (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
- (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
- (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. art. 37.09.

A two-part test is used to determine whether a defendant is entitled to an instruction on a lesser-included offense. See *Cavazos v. State*, 382 S.W.3d 377, 382–83 (Tex. Crim. App. 2012). The first step, which is a question of law, “compares the elements alleged in the indictment with the elements of the lesser offense” to determine “if the proof necessary to establish the charged offense also includes the lesser offense.” *Id.* at 382. The second step requires consideration of whether there is some evidence that would allow a rational jury to acquit the defendant of the greater offense while convicting him of the lesser-included offense. *Id.* at 383; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). “[I]t is not enough that the jury may disbelieve crucial evidence pertaining to

the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted.” *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016).

A person commits aggravated assault by committing assault as defined by [Texas Penal Code § 22.01](#) and by causing “serious bodily injury” to another. [TEX. PENAL CODE § 22.02\(a\)\(1\)](#). A person commits assault by “intentionally, knowingly, or recklessly” causing “bodily injury to another.” *Id.* § 22.01. A person commits the offense of deadly conduct when he “recklessly engages in conduct that places another in imminent danger of serious bodily injury.” *Id.* § 22.05. The State concedes that deadly conduct is a lesser-included offense of aggravated assault causing serious bodily injury and that the first prong of the test is satisfied.

We therefore need only determine whether the evidence would allow a rational jury to find that Simms was guilty only of the lesser offense of deadly conduct. Simms argues on appeal that because he passed out or “dozed off” after entering the tunnel, he was reckless only in regard to his conduct of speeding into the tunnel and not in regard to causing the head-on collision because he was unconscious. “A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.” [TEX. PENAL CODE § 6.03\(c\)](#). Recklessness is a culpable mental state for both deadly conduct and aggravated assault. See [TEX. PENAL CODE §§ 22.01, 22.02, 22.05](#); *Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156, at *4 (Tex. App.—Dallas Nov. 27, 2013, no pet.) (mem. op.; not designated for publication).

*3 In *Guzman v. State*, 188 S.W.3d 185 (Tex. Crim. App. 2006), the defendant put a gun to his girlfriend’s head and pulled the trigger. The gun fired, and she was seriously injured. 188 S.W.3d at 186. The defendant was convicted of attempted murder, and on appeal, he argued that the court erred by not including an instruction on the lesser-included offense of deadly conduct. *Id.* at 188. He asserted that he had removed the clip from the gun and did not know that there was a bullet in the chamber when he pulled the trigger. *Id.* at 187. Therefore, he contended that the shooting was accidental, and he was guilty only of deadly conduct. *Id.*

The Court of Criminal Appeals explained that the defendant could not “argue that there is some evidence that he ‘recklessly engaged in conduct that places another in imminent danger of serious bodily injury,’ but no evidence that he ‘recklessly caused serious bodily injury,’ simply by arguing that he did not act with actual recklessness.” *Id.* at 193. In that case, the reckless act of pointing the gun at his girlfriend's head would support both a deadly conduct and an attempted murder charge. *Id.*

In this case, Simms conceded that he was reckless in speeding into the tunnel. That act of recklessness likewise supports both deadly conduct and aggravated assault. *See id.* Moreover, Simms testified that he was speeding, failed to keep a proper lookout, and failed to stay in his lane. He also testified that he caused serious bodily injury to Pineda, who died as a result of those injuries. In *Guzman*, the defendant also admitted that “he had a reckless state of mind and that his conduct resulted in serious bodily injury.” *Id.* at 194. The Court of

Criminal Appeals concluded that there was no evidence that would permit a rational jury to find the defendant guilty only of deadly conduct and not guilty of aggravated assault. *Id.* The same is true in this case. Because Simms admitted to his reckless state of mind and that his conduct caused Pineda serious bodily injury, the second step of the two-prong test for instructing a jury on a lesser-included offense is not satisfied. We hold that the trial court did not abuse its discretion by denying Simms's requested jury instruction. We overrule Simms's sole issue.

Conclusion

We affirm the judgment of the trial court.

All Citations

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